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No._____

In The

Supreme Court of the United States

October Term, Year 2005

HOWARD WALTER THOMAS

Petitioner,

v.

STATE OF TENNESSEE

Respondent.

On Petition for Writ of Certiorari to the Tennessee Court of Criminal Appeals, Eastern Division at Knoxville

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER STATE ACTION IS REQUIRED FOR AN IDENTIFICATION PROCEDURE TO VIOLATE DUE PROCESS UNDER *NEIL V. BIGGERS*, 409 U.S. 188 (1972)

II. WHETHER A PER SE RULE EXCLUDING EXPERT TESTIMONY ON THE RELIABILITY OF EYEWITNESS TESTIMONY VIOLATES THE DUE PROCESS AND COMPULSORY PROCESS RIGHTS TO PRESENT A DEFENSE AND CALL FAVORABLE WITNESSES RECOGNIZED IN *CHAMBERS V. MISSISSIPPI*, 410 U.S. 284 (1973)

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED BELOW

(1) ORDER, June 25, 2002, *State v. Thomas*, Criminal Court for Knox County, Tennessee, Div. 1 (unpublished, reproduced at App. 2)

(2) ORDER GRANTING DEFENDANT'S REQUEST FOR T.R.A.P. 9 INTERLOCUTORY APPEAL, July 10, 2002, *State v. Thomas*, Criminal Court for Knox County, Tennessee, Div. 1 (unpublished, reproduced at App. 7)

(3) ORDER EXCLUDING TESTIMONY OF EYEWITNESS IDENTIFICATION EXPERT, November 22, 2002, *State v. Thomas*, Criminal Court for Knox County, Tennessee, Div. 1 (unpublished, reproduced at App. 9)

(4) *State v. Thomas*, No. E2003-02090-CCA-R3-CD, 2005 WL 735040 (Tenn. Crim. App., Mar. 30, 2005) (unpublished, reproduced at App. 11)

(5) JUDGMENT, *State v. Thomas*, No. E2003-02090-CCA -R3-CD (Tenn. Crim. App., Mar. 30, 2005) (unpublished, reproduced at App. 87)

(6) ORDER denying discretionary review, *State of Tennessee v. Thomas*, No. E2003-02090-SC-R11-CD (Tenn., Oct. 10, 2005) (unpublished, reproduced at App. 88)

TABLE OF AUTHORITIES

Cases:

Chambers v. Mississippi, 410 U.S. 284 (1973) 5,9

In re Oliver, 333 U.S. 257, 273 (1948) 10

Manson v. Brathwaite, 432 U.S. 98, 114 (1977) 7

Neil v. Biggers, 409 U.S. 188 (1972) 5,7,8

Rock v. Arkansas, 483 U.S. 44 (1987) 9, 10

Simmons v. United States, 390 U.S. 377, 384 (1968) 8

State v. Coley, 32 S.W.3d 831 (Tenn. 2000) 5,6,10

State v. Reid, 91 S.W.2d 247, 271 (Tenn. 2002) 7

Thigpen v. Corey, 804 F.2d 893, 895 (6th Cir. 1986) 7

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Webb v. Texas, 409 U.S. 95 (1972) 10

Constitutional and Statutory Provisions:

U.S. Const. Amend. VI 1,9,10

U.S. Const. Amend. XIV, Section 1 1,10

Other Authorities:

Annotation, "Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony", 46 A.L.R. 4th 1047 (2005) 9

Annotation, "Admissibility of In-Court Identification as Affected by Pretrial Encounter That Was Not Result of Action by Police, Prosecutors, and the Like", 86 A.L.R. 5th 463 (2001) 7

Annotation, "Challenge to Eyewitness Identification Through Expert Testimony", 35 Am. Jur. Proof of Facts 3d 1 (2005) 9, 12

Kolar, Barry, *Truth From Testing*, Tenn. B.J., vol.38, no.8, pg. 12 *et seq.* (Aug. 2002) 12

Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, Dept. of Justice Pub. No. NCJ 161258, 24 (1996) 11

PETITION FOR WRIT OF CERTIORARI

Petitioner, Howard Walter Thomas, respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the Tennessee Court of Criminal Appeals, Eastern Division at Knoxville.

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STATEMENT OF JURISDICTION

The Tennessee Court of Criminal Appeals entered an opinion and judgment affirming the petitioner's convictions on March 30, 2005. [App. 11, 87]. Petitioner timely sought discretionary review from the Tennessee Supreme Court, but such review was denied on October 10, 2005. [App. 88].

Petitioner seeks certiorari review of a judgment of a lower state court, the Tennessee Court of Criminal Appeals, which was subject to discretionary review by a state court of last resort, the Tennessee Supreme Court. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(a).

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CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI [App. 89]
U.S. Const. Amend. XIV, Section 1 [App. 89]

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STATEMENT OF THE CASE

This case is a murder case in which the death penalty was initially sought. However, while the petitioner was convicted at trial, he did not receive a death sentence.

Mr. John and Mrs. Yvonne Cook were traveling from their home in Wisconsin to Raleigh, North Carolina on the night of

March 23, 1991. Upon approaching Knoxville, Mrs. Cook's husband exited the interstate and stopped on the side of the road to look at a map. Soon thereafter, shots were fired into the driver's side of the vehicle and Mr. Cook slumped to the passenger side of the vehicle. The assailant then entered the vehicle and drove away with both Mr. and Mrs. Cook.

The assailant stopped the vehicle on a deserted roadside and ordered Mr. and Mrs. Cook out of the car. By this time, Mr. Cook was deceased from the wounds he had suffered. When another vehicle approached, the assailant fled in the Cooks' vehicle and left Mrs. Cook and her husband on the roadside. Later that day, Mrs. Cook gave the Knoxville Police a description of her assailant, yet no arrest was ever made.

Upon her return to Wisconsin, Mrs. Cook underwent hypnosis in an effort to refine the image of the assailant so that she might be better able to assist authorities in apprehending the assailant. In August of 1991, Mrs. Cook underwent hypnosis with the assistance of Dale Sternberg, a clinical social worker in Wisconsin. In October of 1991, Mrs. Cook gave a description of the assailant to a Wisconsin police sketch artist who prepared a composite sketch of the assailant.

In May of 2000, Mr. Thomas was arrested and arraigned, and charged with first degree murder and other offenses related to the incident involving Mr. and Mrs. Cook. The prosecution ultimately filed a notice of intent to seek the death penalty.

The Knoxville News-Sentinel published a story on the arrest, along with a picture of Mr. Cook and a current picture of the petitioner. This article, and the accompanying picture of Mr. Thomas, was mailed to Ms. Cook by friends in Knoxville. Upon seeing the photograph, Ms. Cook was of the belief that the petitioner was the assailant. This photograph was in a newspaper article that explicitly stated that Mr. Thomas had been arrested for

the murder of Ms. Cook's husband, and it was viewed by Ms. Cook some nine years after the events of March 21, 1991 in Knoxville and subsequent to her undergoing hypnosis, which inflated her confidence in her ability to make a positive identification of a suspect.

The petitioner filed a motion to suppress any identifications made by Mrs. Cook either before or at trial on the basis of the hypnosis and the viewing of the single photograph from the newspaper article. At the hearing on the motion, Yvonne Cook expressed the belief that she thought Mr. Thomas was the perpetrator. The trial court denied the suppression motion, finding that there was no state action involved in either the one photograph show-up from the newspaper or the hypnosis sessions.

As a result of the rulings of the trial court that allowed the identification by Yvonne Cook to be admissible, the defense was faced with Mrs. Cook's impending trial identification of Mr. Thomas, an identification made over twelve years after the events in question, influenced by hypnosis as well as a show-up from a single newspaper photograph. In order to counter the impact of this testimony, defense counsel consulted with Dr. Elizabeth Loftus, a nationally known expert on the issue of eyewitness identification, and the circumstances which would make such identification subject to mistake.

After reviewing all of the material related to Mrs. Cook's opportunity to initially make an identification, together with the circumstances surrounding her hypnosis and her receipt of the newspaper article and photograph, Dr. Loftus was prepared to testify that any identification of Mr. Thomas by Mrs. Cook was suspect. On November 12, 2002, defense counsel filed Dr. Loftus' report with the trial court, which detailed a number of problems relating to Mrs. Cook's identification, with the conclusion that,

among other reasons, the viewing of a single photograph by Mrs. Cook undermined her identification.

Specifically, Dr. Loftus' stated that there were "factors present in the current case that are known to create problems for accurate eyewitness testimony," and she would be prepared to testify about the "workings of human memory," the effects of factors such as suggestions on memory, and the creation and characteristics of false memories. [App. 56]. She would identify and explain "factors that are important in the current case," such as the nine-year passage of time between the crimes and the identification, resulting in Mrs. Cook's memory fading and her becoming "more vulnerable to suggestive influences," and the "highly suggestive" procedure of her "viewing a single photo [of the defendant] in a news article," which would increase her confidence in the identification of the defendant. [App. 57]. Dr. Loftus described this as "[t]he phenomenon of 'photo-biased identification' [which] has been described in the psychological literature." *Id.* She said that "[a]nother very important factor is what is called the confidence factor," meaning that "even if Mrs. Cook is expressing confidence in her current account, this does not mean she is accurate. Her confidence level could be influenced by many factors, e.g., viewing prior photos, or being hypnotized." *Id.* Dr. Loftus concluded her opinion, saying, "Many of the factors that I would discuss are not clearly understood by jurors, and some are even in conflict with misconceptions that jurors have about the workings of memory, which is precisely why this sort of testimony can be helpful to jurors." *Id.*

A hearing was held on November 13, 2002, to determine if the testimony of Dr. Loftus should be admitted. After the hearing, the court ruled Dr. Loftus' testimony inadmissible under a Tennessee Supreme Court decision, *State v. Coley*, 32 S.W.3d

831 (Tenn. 2000), which held that expert testimony concerning the reliability of eyewitness testimony is per se inadmissible.

Mr. Thomas' case proceeded to trial with the prosecution being able to present hypnotically influenced testimony from an eyewitness who had been subjected to a one photograph show-up, while at the same time Mr. Thomas was precluded from presenting in his defense testimony from an expert to explain the fallibility of that eyewitness testimony. Mr. Thomas was convicted at trial, but did not receive the death penalty.

The first question presented concerns whether state action is required for an identification procedure to violate due process under *Neil v. Biggers*, 409 U.S. 188 (1972). The petitioner raised this federal question with the trial court through a pre-trial motion to suppress. The trial court entered an order denying suppression, and the petitioner filed a motion for interlocutory review of the denial of suppression, which was granted by the trial court yet denied by the Tennessee Court of Criminal Appeals. The petitioner raised this issue again with the Tennessee Court of Criminal Appeals on direct appellate review after conviction. [App. 2, 7-8, 48-49]. Discretionary review was denied by the Tennessee Supreme Court. [App. 88]. Accordingly, this federal question was timely and properly raised, and this Court has jurisdiction to review the judgment on a writ of certiorari.

The second question presented is whether a per se rule excluding expert testimony on the reliability of eyewitness testimony violates the due process and compulsory process rights to present a defense and call favorable witnesses recognized in *Chambers v. Mississippi*, 410 U.S. 284 (1973). The petitioner raised this federal question with the trial court in response to the State of Tennessee's motion for a pretrial hearing on the admissibility of trial testimony from the defendant's expert on eyewitness identification testimony. The trial court held an

evidentiary hearing concerning the expert testimony, and subsequently entered an order precluding the defendant's expert from testifying at trial. [App. 9]. The petitioner raised this issue again with the Tennessee Court of Criminal Appeals on direct appellate review after conviction. [App. 63]. Discretionary review was denied by the Tennessee Supreme Court. [App. 88]. Accordingly, this federal question was timely and properly raised, and this Court has jurisdiction to review the judgment on a writ of certiorari.